STATE OF MICHIGAN

COURT OF APPEALS

HORIZON GROUP PROPERTIES, L.P., d/b/a HORIZON GROUP PROPERTIES LIMITED PARTNERSHIP,

Plaintiff-Appellee,

v

RAY W. TEJCHMA and JUDY TEJCHMA,

Defendants-Appellants.

UNPUBLISHED
August 14, 2003

No. 238625
Muskegon Circuit Court
LC No. 99-039359-CH

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment entered in favor of plaintiff and against defendants. We affirm.

This action arises out of a contract to purchase property that is located in Fruitport Township in Muskegon County. On May 25, 1994, defendants entered into a real estate purchase agreement with Court Concept Associates, Inc. ("Court Concept"). This purchase agreement contained a "right to assign" clause, whereby Court Concept had the right to assign all or any part of its rights and obligations under the agreement to any person, partnership, corporation or other entity, provided that written notice of the assignment was provided to seller prior to the closing date.

On May 4, 1995, Court Concept assigned its interests and obligations under the purchase agreement to Horizon Outlet Centers Limited Partnership. Horizon/Glen Outlet Centers Limited Partnership then assumed the interests and obligations under the purchase agreement as the successor in interest to Horizon Outlet Centers Limited Partnership. Between July 12, 1996, and October 31, 1998, the parties executed an addendum and three extension agreements. On April 8, 1998, a fourth extension agreement was entered into, whereby the parties agreed that closing would be on or before April 8, 1999.[1]

On April 7, 1999, plaintiff received correspondence from defendants that stated the closing documents would be substantially prepared by 4:00 p.m. the following day. However,

[1] On April 7, 1999, there was a failed attempt to extend the purchase agreement for another year.

according to plaintiff, the draft of the deed provided on April 7, 1999, referenced an erroneous legal description and conveyed only half of the property. On April 8, 1999, plaintiff received from defendants a proposed closing statement and a revised legal description of the property. According to plaintiff, the legal description was still incorrect. Plaintiff responded to this correspondence by faxing an "Assignment of the Purchase Agreement" signed by Prime Retail. Plaintiff intended to sign, and thus execute, this assignment at the closing. However, plaintiff did not attend the closing on April 8, 1999, because defendants failed to provide (1) a warranty deed with a correct legal description; (2) marketable title to the property; and (3) a current title commitment evidencing marketable title. Plaintiff brought suit seeking specific performance of the purchase agreement or, in the alternative, recovery against defendants in the amount of $2,200,000, together with reasonable attorney fees, expenses, and costs under breach of contract, unjust enrichment, and fraud theories.

Defendants moved for summary disposition and sanctions. The trial court granted defendants' motion with regard to the unjust enrichment and fraud claims, but denied the motion as to the breach of contract claim and sanctions request. On May 15, 2000, defendants unsuccessfully renewed their motion for summary disposition as to plaintiff's breach of contract claim. Subsequently, on November 29, 2000, plaintiff moved for summary disposition, which the trial court granted pursuant to MCR 2.116(C)(10). The trial court found that defendants clearly breached the contract, and that the breach prevented the closing from taking place on April 8, 1999.[2] The trial court stated that once defendants breached the contract and prevented the closing from taking place, plaintiff's execution of the assignment of April 8, 1999, would have been a "useless formality." As to plaintiff's claim for specific performance, the trial court found that, from the uncontroverted facts on the record, defendants were estopped from asserting as a defense that plaintiff was required to execute the assignment on April 8, 1999. On December 18, 2001, the trial court entered judgment in favor of plaintiff that ordered defendants to specifically perform its obligations under the various agreements and extensions, and to convey to plaintiff the property at issue. Upon conveyance, plaintiff was to pay the balance of the purchase price.

The only issue on appeal is whether plaintiff lacks standing to seek enforcement of the purchase agreement. Whether a party has standing is a question of law that we review de novo. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001). Questions of contract interpretation are also reviewed de novo. *Alibri v Detroit/Wayne Co Stadium Auth*, 254 Mich App 545, 554-555; 658 NW2d 167 (2002). "A contract must be construed in its entirety to determine the intent of the parties and give legal effect to it as a whole." *Id.* at 558.

> The initial question whether contract language is ambiguous is a question of law. If the contract language is clear and unambiguous, its meaning is a question of law. Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact. [*Port Huron Ed Ass'n v Port*

[2] The trial court also concluded that the written notice provision in the original contract regarding the closing date was superceded by the terms of the extensions, which did not require written notice. Defendants do not contest this ruling in their appellate brief.

Huron Area School Dist, 452 Mich 309, 323; 550 NW2d 228 (1996) (citations omitted).]

"A contract is ambiguous if 'its words may reasonably be understood in different ways.'" *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998), quoting *Raska v Farm Bureau Ins Co*, 412 Mich 355, 362; 314 NW2d 441 (1982).

In the instant case, the initial purchase agreement required defendants to provide a title commitment and to convey marketable title. Paragraph 2 of the final extension agreement, effective April 8, 1998, between Horizon/Glen Outlet Centers Limited Partnership, assignee of Court Concept ("purchaser") and defendants ("sellers"), states in relevant part:

> Purchaser acknowledges that Purchaser has removed its contingencies from the parties' sales agreement, but the parties agree the Purchaser's obligation to close herein is contingent upon the Sellers not being in default, and is further contingent upon the Seller's delivery of marketable title to the subject property at the time of closing and subject to the acts or omissions of the Sellers while in possession of the subject property from the date of the parties' original Purchase Agreement until the date of closing. The obligation of the Purchaser to close is further subject to the consent of the Purchaser's Board of Directors. If the foregoing conditions are not satisfied in accordance with Purchaser's expectations, Purchaser in its sole discretion will not be obligated to close.

Two months later, pursuant to a merger between Horizon/Glen and Prime Retail, Horizon/Glen's interest in the purchase agreement was obtained by Prime Retail on June 15, 1998.

Based on the clear language of the initial purchase agreement, defendants were obligated to appear at closing with the necessary documentation to effectuate the closing with Prime Retail. However, during discovery, defendants admitted that, as of the scheduled closing date, the deed did not contain required language or a correct legal description. They also admitted that there were two liens on the property and that the title work had not been updated. Thus, defendants did not have the necessary documentation as of April 8, 1999, to effectuate the closing.

Prime Retail intended to assign its rights under the purchase agreement to plaintiff at the closing on April 8, 1999, where both parties would execute the necessary paperwork. However, because plaintiff anticipated defendants' breach, plaintiff did not attend the closing or execute the assignment. Defendants argue that plaintiff's potential to become a successor to the agreement never ripened because plaintiff knowingly failed to execute the assignment before the expiration of the purchase agreement on April 8, 1999.[3]

---

[3] Plaintiff argues that, based on the test articulated in *Lee*, *supra* at 739-740, it clearly has standing in this action. However, our determination of whether plaintiff has standing in this case turns on the validity of the assignment between it and Prime Retail. Therefore, we do not need to address the test adopted by the *Lee* Court.

The assignment, which was entered into by Prime Retail ("assignor") and plaintiff ("assignee"), on April 14, 1999, included the following language:

> NOW, THEREFORE, IN CONSIDERATION of the entry of this Assignment by the parties hereto, the parties agree as follows:
>
> Section 1. Assignment. Assignor hereby assigns to Assignee, and Assignee hereby accepts and assumes from Assignor, all of Assignor's rights and obligations under the Contract (including but not limited to all of Assignor's right, title and interest in and to any and all deposit monies paid to Seller pursuant to the provisions thereof).
>
> * * *
>
> 3.1. Effect. This Assignment shall become effective on and only its execution and delivery by each party hereto. No determination by any court, governmental body or otherwise that any provision hereof is invalid or unenforceable in any instance shall affect the validity or enforceability of (a) any other provision hereof, or (b) such provision in any circumstance not controlled by such determination. Each such provision shall be valid and enforceable to the fullest extent allowed by, and be construed wherever possible as being consistent with, applicable law.

Plaintiff avers that the assignment from Prime Retail to plaintiff was signed on April 14, 1999. Defendants present no evidence to dispute this; therefore, the assignment, by its terms, was effective on that date.[4] Therefore, the question becomes whether the assignment is valid and enforceable because it occurred after the April 8, 1999 closing date.

We find that the assignment is valid and enforceable; thus, plaintiff has standing to assert its cause of action against defendants for breach of contract. According to the terms of the assignment, plaintiff assumed all of Prime Retail's rights and obligations under the purchase agreement, which included the right to pursue a breach of contract claim.[5] The evidence clearly establishes that defendants breached the contract, according to its terms, by not having the necessary documentation in place on April 8, 1999, to close on the land sale. Thus, as of that date, Prime Retail had a viable cause of action against defendants. Causes of action for breach of contract, where the contract is not personal, are assignable. *Barlow v Lincoln-Williams Twist Drilling Co*, 186 Mich 46, 48; 152 NW 1034 (1915). This cause of action was assigned to plaintiff one week later. Because the assignee stands in the shoes of the assignor, plaintiff now possessed Prime Retail's right to sue defendants for breach of contract. *Professional*

[4] Contracts such as this one, which are not personal in nature, are assignable. *UAW-GM, supra* at 509-510; *Northwestern Cooperage & Lumber Co v Byers*, 133 Mich 534, 537-538; 95 NW 529 (1909). Further, the terms of the purchase agreement permitted its assignment.

[5] Paragraph 15 of the purchase agreement, "Default," states in pertinent part, "If Seller defaults in the performance of its obligations under this Agreement, Buyer may exercise and pursue any right or remedy against Seller which may be available at law or in equity, including, without limitation, specific performance, all of which rights and remedies shall be cumulative."

Rehabilitation Assoc v State Farm Mut Auto Ins Co, 228 Mich App 167, 177; 577 NW2d2d 909 (1998). Accordingly, we affirm the trial court's ruling, albeit for a different reason.[6] *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

Affirmed.

/s/ William C. Whitbeck
/s/ Michael R. Smolenski
/s/ Christopher M. Murray

[6] Because we affirm the trial court's judgment, we need not separately address defendants' contention that the court's award of attorney fees and costs should be set aside, as paragraph 17(k) of the contract specifically provided that the prevailing party was entitled to them. Defendants do not present a separate argument as to the reasonableness of the award.